Low Yien Kwee & Ors v Ever Noble Sdn Bhd

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–753 OF 2006
BALIA YUSOF J
10 MARCH 2008

Legal Profession — Professional discipline — Practice and Etiquette Rules — Application for disqualification of solicitors — Likelihood of one of plaintiffs' solicitors (firm) being made witness in present suit — Whether there was sufficient evidence to justify denying the firm right to represent plaintiffs — Legal Profession (Practice and Etiquette) Rules 1978 r 28

Legal Profession — Professional discipline — Practice and Etiquette Rules — Application for disqualification of solicitors — Whether firm were in breach of ethics of legal profession — Whether professional conduct of firm was likely to be impugned when it acted for plaintiffs — Whether there was conflict of interest or breach of professional independence by the firm — Legal Profession (Practice and Etiquette) Rules 1978

The plaintiffs were 74 individual purchasers of the units of condominiums known as Menara Kuda Lari ('the condominiums') which were developed by the defendant. The defendant in turn had instituted two civil suits against some of the plaintiffs, who were committee members of the Persatuan Pembeli-Pembeli Rumah Kuda Lari ('the committee members'). In their civil suit against the defendant the 74 plaintiffs had sought specific performance of the sale and purchase agreements that they had entered into with the defendant, vacant possession of the condominiums and a declaration that the defect liability period has not commenced as yet. This was an application by the defendant seeking to disqualify the plaintiffs' solicitors, Messrs Cheong Wai Meng and Van Buerle ('the firm') from further acting for the plaintiffs in this suit. The basis for this application was that the firm had allegedly breached rr 3, 4, 5 and 43 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules'). As proof, the defendant had alleged that the firm was in breach of the ethics of its profession and was in breach of the law for the manner in which it had advised the plaintiffs and conducted the plaintiffs' affairs. The defendant further submitted, inter alia, that the firm had without authority entered an appearance for one Mr Lim Keat Lee ('Mr Lim') in another civil suit which the defendant had instituted against the committee members, for which the defendant had lodged a complaint to the Lembaga

Tatatertib Peguam against the firm; that the firm had advised the plaintiffs to disobey and disregard a consent order dated 9 September 2002; and that as the solicitors of the firm will be made witnesses in the present suit they ought to be disqualified from acting for the plaintiffs. The firm through an affidavit filed by one of the plaintiffs denied all the allegations and the grounds forwarded by the defendant. Instead it was the firm's contention that this application by the defendant was an abuse of process in that it was aimed at delaying the matter. The plaintiffs further submitted that a similar application to disqualify the firm had also been filed by the defendant in its civil suit against the committee members. It was therefore the firm's contention that the issues of embarrassment and breach of professional conduct as alleged did not arise in the circumstances and facts disclosed in this case.

Held, dismissing the application with costs:

(1) In this present application, there was not an iota of evidence produced by the defendant to suggest that the firm and/or the solicitors of the firm had done the acts complained of. The defendant had to show that the professional conduct of the firm was likely to be impugned by it taking up the briefs in the instant case. However the affidavits filed in support of this application were insufficient to prove that rr 4 and 43 of the Rules had been breached. There was also no evidence that the solicitors had volunteered advice to bring this action or to stir up strife and litigation (see para 10).

(2) The firm, which was representing the plaintiffs in this suit, was also representing some of the plaintiffs, ie the committee members, in two other civil suits instituted by the defendant against them. The firm was representing the same people in all three suits and the only difference was that the capacity of the parties represented was either as the plaintiffs or the defendants. Such circumstances did not give rise to a conflict of interest or a breach of professional independence (see para 11).

(3) One of the grounds relied on by the defendant in this application to disqualify the firm was that the latter had acted without authority when it entered an appearance for Mr Lim in another civil suit which the defendant had instituted against the committee members. However, this ground was misconceived because the authority to act in another civil suit had nothing to do with the present suit and the said Mr Lim was not a party in the instant case. If at all the proper forum to ventilate this issue would be in that particular suit and not in the present suit (see para 12).

(4) From the notes of proceedings in Saman Pemula No 24–418 of 2000, a civil suit that involved the same parties and two others, it was clear that one of the solicitors of the firm will be called as a witness but that was only with respect to that proceeding and not the instant case. The fact that there was an objection to one of the solicitors of the firm in Originating Summons No 24–418 of 2000 and a complaint lodged against another solicitor of the firm to the Lembaga Tatatertib Peguam did not automatically mean that the firm ought to be restrained in the instant case. In order for an advocate and solicitor to be disqualified under r 28 of the Rules, it must be shown that his appearance as a witness was in respect of a material and disputed question of fact. This had to be proved and the burden lay on the party seeking for the disqualification. However, the facts and circumstances of this case and the affidavits filed in support did not disclose what material and disputed questions of fact the solicitor from the firm would be required to testify as a witness in the present proceedings. As such, there was insufficient evidence to justify denying the firm the right to represent the plaintiffs in the instant case (see paras 15–17).

[Bahasa Malaysia summary

Plaintif-plaintif adalah 74 pembeli persendirian unit-unit pangsapuri yang dikenali sebagai Menara Kuda Lari ('pangsapuri tersebut') yang dimajukan oleh defendan. Defendan sebaliknya telah memulakan dua tindakan sivil terhadap sebahagian daripada plaintif-plaintif, yang adalah ahli-ahli jawatankuasa Persatuan Pembeli-Pembeli Rumah Kuda Lari ('ahli-ahli jawatankuasa tersebut'). Di dalam tindakan sivil terhadap defendan, 74 plaintif telah memohon pelaksanaan spesifik terhadap perjanjian-perjanjian jual beli yang mereka masuki dengan defendan, milikan kosong pangsapuri tersebut dan perisytiharan bahawa tempoh kecacatan liabiliti belum bermula lagi. Ini adalah permohonan oleh defendan yang memohon untuk menyingkirkan peguamcara-peguamcara plaintif-plaintif, Tetuan Cheong Wai Meng dan Van Buerle ('syarikat tersebut') daripada mewakili plaintif-plaintif di dalam tindakan ini. Asas permohonan ini adalah bahawa syarikat tersebut telah didakwa melanggar kk 3, 4, 5 dan 43 Peraturan Profesion Undang-Undang (Amalan dan Etika) 1978 ('Peraturan'). Sebagai bukti, defendan telah mendakwa bahawa syarikat tersebut melanggar etika profesionnya dan melanggar undang-undang untuk cara bagaimana ia menasihati plaintif-plaintif dan menjalankan hal ehwal plaintif-plaintif. Defendan selanjutnya berhujah, antara lain, bahawa syarikat tersebut telah tanpa kuasa memasukkan kehadiran untuk seorang yang bernama En Lim Keat Lee ('En Lim') di dalam tindakan sivil yang lain yang mana defendan telah mulakan terhadap ahli-ahli jawatankuasa, yang mana defendan telah membuat aduan kepada Lembaga Tatatertib Peguam terhadap syarikat

tersebut; bahawa syarikat tersebut telah menasihati plaintif-plaintif untuk tidak mendengar dan tidak mempedulikan perintah persetujuan bertarikh 9 September 2002; dan oleh kerana peguamcara-peguamcara syarikat tersebut akan dijadikan saksi-saksi di dalam tindakan ini, mereka patut disingkirkan daripada mewakili plaintif-plaintif. Syarikat-syarikat tersebut melalui afidavit yang difailkan oleh salah seorang daripada plaintif-plaintif menafikan kesemua dakwaan dan alasan-alasan yang diberikan oleh defendan. Sebaliknya ia adalah hujahan syarikat tersebut bahawa permohonan ini oleh defendan adalah penyalahgunaan proses di mana ia bertujuan untuk menangguhkan perkara tersebut. Plaintif-plaintif selanjutnya berhujah bahawa permohonan yang sama untuk menyingkir firma tersebut juga difailkan oleh defendan di dalam tindakan sivilnya terhadap ahli-ahli jawatankuasa. Oleh itu adalah hujahan syarikat tersebut bahawa isu rasa malu dan menyalahi tingkah laku profesional seperti yang didakwa tidak berbangkit di dalam keadaan dan fakta yang dikemukakan di dalam kes ini.

Diputuskan, menolak permohonan dengan kos:

(1) Di dalam permohonan ini, tidak terdapat sedikitpun keterangan yang dikemukakan oleh defendan untuk menyatakan bahawa syarikat tersebut dan/atau peguamcara-peguamcara syarikat tersebut telah melakukan tindakan yang diadukan. Defendan terpaksa menunjukkan bahawa tingkah laku profesional syarikat tersebut mungkin dipersoalkan apabila ia menerima arahan-arahan di dalam kes ini. Walau bagaimanapun, afidavit-afidavit yang difailkan di dalam menyokong permohonan ini tidak mencukupi untuk membuktikan bahawa kk 4 dan 43 Peraturan tersebut telah dilanggar. Juga tidak terdapat keterangan bahawa peguamcara-peguamcara telah dengan sukarela memberikan nasihat untuk membawa tindakan ini atau membangkitkan persengketaan dan litigasi (lihat perenggan 10).

(2) Syarikat tersebut, yang mana mewakili plaintif-plaintif di dalam tindakan ini, juga mewakili sebahagian daripada plaintif-plaintif, iaitu ahli-ahli jawatankuasa, di dalam dua tindakan sivil yang lain yang dimulakan oleh defendan terhadap mereka. Syarikat tersebut mewakili orang yang sama di dalam ketiga-tiga tindakan dan satu-satunya yang berbeza adalah kapasiti pihak-pihak yang diwakili sama ada sebagai plaintif-plaintif atau defendan. Keadaan sedemikian tidak membangkitkan konflik kepentingan atau pelanggaran kebebasan profesional (lihat perenggan 11).

(3) Salah satu alasan yang digunakan oleh defendan di dalam permohonan ini untuk menyingkir syarikat tersebut adalah bahawa syarikat tersebut telah bertindak tanpa kuasa apabila ia memasukkan kehadiran untuk

En Lim di dalam tindakan sivil lain yang mana defendan telah mulakan terhadap ahli-ahli jawatankuasa. Walau bagaimanapun, alasan ini adalah salah tanggap kerana kuasa untuk bertindak di dalam tindakan sivil lagi satu tidak mempunyai hubungan dengan tindakan sekarang ini dan En Lim bukanlah pihak di dalam kes ini. Tambahan, forum yang betul untuk menyuarakan isu ini adalah di dalam tindakan tersebut dan bukan di dalam tindakan sekarang ini (lihat perenggan 12).

(4) Daripada nota-nota prosiding di dalam Saman Pemula No 24–418 Tahun 2000, tindakan sivil yang melibatkan pihak yang sama dan dua yang lain, ia adalah jelas bahawa salah seorang daripada peguamcara syarikat tersebut akan dipanggil sebagai saksi tetapi itu hanya berkaitan dengan prosiding tersebut dan bukan kes ini. Fakta bahawa terdapat bantahan terhadap salah seorang peguamcara syarikat tersebut di dalam Saman Pemula No 24–418 Tahun 2000 dan aduan yang dilaporkan terhadap seorang lagi peguamcara syarikat tersebut kepada Lembaga Tatatertib Peguam tidak secara automatik bermaksud bahawa syarikat tersebut patut dihalang di dalam kes ini. Untuk peguamcara dan peguambela disingkirkan di bawah k 28 Peraturan tersebut, ia mesti ditunjukkan bahawa kehadirannya sebagai saksi adalah berkaitan material dan persoalan fakta yang dipertikaikan. Ini mesti dibuktikan dan beban terletak ke atas pihak yang memohon penyingkiran. Walau bagaimanapun, fakta dan keadaan kes ini dan afidavit yang difailkan untuk menyokong tidak mendedahkan apa persoalan material dan fakta yang dipertikaikan yang peguamcara daripada syarikat tersebut akan dikehendaki untuk memberi keterangan sebagai saksi di dalam prosiding ini. Oleh itu, tidak terdapat keterangan yang mencukupi untuk menjustifikasi menafikan syarikat tersebut hak untuk mewakili plaintif-plaintif di dalam kes ini (lihat perenggan 15–17).]

Notes

For cases on application for Practice and Etiquette Rules, see 9 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1703–1710.

Cases referred to

Emperor v Dadu Ramu AIR 1939 Bom 150 (refd)

R v Secretary of State for India In Council & Ors, ex parte Ezekiel [1941] 2 All ER 546; [1941] 2 KB 169 (refd)

RS Muthiah v Pembinaan Fiba Sdn Bhd [2004] 4 MLJ 78 (refd)

Legislation referred to

Legal Profession (Practice and Etiquette) Rules 1978 rr 3, 4, 5, 5(b)(ii), 28, 43

Rules of the High Court 1980 O 81

SC Tan (Cheong Wai Meng & Van Buerle) for the plaintiffs.
Surinder Singh (Ong and Manecksha) for the defendant.

Balia Yusof J:

[1] Enclosure 19 in this suit is an application by the defendant ('Ever Noble') to disqualify the plaintiffs' solicitors Messrs Cheong Wai Meng & Van Buerle from acting in the matter. The ground stated in the application in encl 19 is that the firm of Cheong Wai Meng & Van Buerle and its solicitors ('firm') has breached rr 3, 4, 5 and 43 of the Legal Profession (Practice and Etiquette) Rules 1978 ('Rules'). Ever Noble is also seeking that the plaintiffs pay the cost of this application.

[2] To substantiate its ground, Ever Noble alleges that the firm in advising and representing the plaintiffs has caused the plaintiffs to disobey a consent order dated 9 September 2002 in respect of Saman Pemula No 24–418 of 2001 in the High Court of Pulau Pinang. It is counsel's submission that the firm has encouraged the house buyers to disobey the said consent order and/or alternatively encouraged the spirit of the said consent order to be ignored. It is further submitted that the plaintiffs' counsel has placed themselves in a position of conflict when they stand to be witnesses in a series of action in respect of the consent order and another action in Suit No 22–484 of 2006.

[3] Ever Noble's application in encl 19 is supported by an affidavit in encls 19 and 30. The acts of the firm and matters which Ever Noble alleges to be in breach of ethics of the profession and a breach of the law are as follows:

(a) the solicitors of the firm has without authority entered appearance for the sixth defendant in Civil Suit No 22–484 of 2006;

(b) the solicitors in the firm has advised the plaintiffs to disobey the consent order dated 9 September 2002 in Suit No 24–418 of 2001 and this is evident through Suit No 22–759 of 2006 filed by Ever Noble against the firm together with some other parties;

(c) the firm has put itself in a situation of conflict being the 'unseen hands' as alleged in the complaint filed by Ever Noble to the Lembaga Tatatertib Peguam; and

(d) the firm is a threat to Ever Noble and is full of hatred because of the suit 22–759 of 2006 filed by Ever Noble against the firm and its partners.

A **[4]** As for ground (a), Ever Noble has filed Civil Suit No 22–484 of 2006 against the chairman and the committee members of the Persatuan Pembeli-Pembeli Rumah Kuda Lari. The firm has entered appearance for all the defendants in that suit and Ever Noble claims that the firm has by so doing acted unprofessionally and has breached the provisions of the Rules B because one of the defendants, one Mr Lim Keat Lee has not authorised or appointed the firm to act on his behalf. The said Mr Lim Keat Lee has written to Messrs Ismail Khoo & Associate informing that he had never appointed the firm to act for him in the said civil suit. Ever Noble's counsel in the instant case has taken up the issue and has lodged a complaint to the C Lembaga Tatatertib Peguam against the firm for acting without authority for the said Mr Lim Keat Lee.

[5] As for ground (b), Ever Noble has filed an action in Civil Suit No 22–759 of 2006 against the firm and its solicitors together with 13 others D as the defendants. These 13 other defendants are the committee members of the Persatuan Pembeli-Pembeli Rumah Kuda Lari. In its statement of claim against the said defendants, Ever Noble claims that the firm as advisors to the committee members has instigated and collaborated with the committee members to defile them and to disobey and disregard the consent order dated E 9 September 2002. Having perused the statement of claim/writ in Civil Suit No 22–759 of 2006 it is evident that what Ever Noble is seeking is to injunct the firm from acting in conflict and/or conspiring against them. Putting it very simply, what essentially Ever Noble is doing is merely persuading the court to disqualify and/or prevent the firm from acting for those whom it F represented in Suit No 22–484 of 2006. There is very strong resemblance and similarity in the relief sought against the firm in Suit 22–759 of 2006 and the present application.

[6] The present Civil Suit No 22-753 of 2006 is brought about by 74 G individuals who are the purchasers of the units of the condominiums known as Menara Kuda Lari which were developed by Ever Noble. Among these 74 individuals are the committee members of the Persatuan Pembeli-Pembeli Rumah Kuda Lari who are also among the defendants in Civil Suits No 22–484 of 2006 and No 22–759 of 2006 filed by Ever Noble. The 74 H plaintiffs in the present suit are seeking for a relief of specific performance of the sale and purchase agreement entered with Ever Noble, vacant possession of the property and for a declaration that the defect liability period as mentioned in the agreement has not yet commenced. Counsel for Ever Noble submits that there is a likelihood that the solicitors of Messrs Cheong Wai I Meng & Van Buerle will be made witnesses in the present suit and should therefore be disqualified from acting for the plaintiffs.

[7] In reply to Ever Noble's application, the firm through an affidavit filed by one of the plaintiffs denies all the allegation and the ground put forth by Ever Noble in seeking to disqualify them from acting for the plaintiffs. The firm contends that this application is an abuse of process which is aimed at delaying the matter in particular the hearing of encl 2 which is an application by the plaintiff under O 81 of the Rules of the High Court 1980. The plaintiffs further contend that a similar application to disqualify the firm has also been filed by Ever Noble in Suit No 22–484 of 2006 seeking to disqualify them from representing the committee members of the Persatuan Pembeli-Pembeli Rumah Kuda Lari. It is further submitted that the issues of embarrassment and breach of professional conduct as alleged does not arise in the circumstances and facts disclosed in this case.

[8] In my observation, the ground of objection raised by Ever Noble is centered essentially on the provisions of rr 3, 4, 5 and 43 of the Rules. For ease of reference, it is pertinent to reproduce the above mentioned rules in toto which read as follows:

3 Advocate and solicitor not to accept brief if embarrassed —

(a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed.

(b) An embarrassment arises —

(i) where the advocate and solicitor finds he is in possession of confidential information as a result of having previously advised another person in regard to the same matter;

(ii) where there is some personal relationship between him and a party or a witness in the proceedings.

4 No advocate and solicitor to accept brief if professional conduct likely to be impugned.

No advocate and solicitor shall accept a brief in a case where he knows or has reason to believe that his own professional conduct is likely to be impugned.

5 No advocate and solicitor to accept brief if difficult to maintain professional independence.

(a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.

(b)(i) An advocate and solicitor who has at any time advised or drawn pleadings or acted for a party in connection with the institution or prosecution or defence of any suit, appeal or other proceedings shall not act, appear or plead for the apposite party in that suit, appeal or other proceedings.

(ii) An advocate and solicitor shall not act unless the consent of the first party for whom the advocate and solicitor acted is obtained in writing and the advocate and solicitor is not embarrassed by so acting.

43 Advocate and solicitor not to stir up strife and litigation.

No advocate and solicitor shall volunteer advice to bring an action or to stir up strife and litigation.

[9] It is elementary that in deciding whether the firm and solicitors has breached any of the above provisions, the whole facts and circumstances of the case must be closely examined. From the established facts, it is without doubt that there is a lot of legal tussle between Ever Noble and the purchasers of the units of the condominium developed by them and also with the committee members of the association representing the said purchasers. The firm of Cheong Wai Meng & Van Buerle is the solicitor representing those purchasers and the committee members. Up to the date of this judgment there are already three suits involving the parties here in the High Court of Penang. As can be seen in Civil Suit No 22–759 of 2006, the firm of Cheong Wai Meng & Van Buerle together with its solicitors has also been cited as among the defendants. On the ground of professional conduct likely to be impugned under r 4, Ever Noble alleges that the firm and/or its solicitors has advised and investigated the house buyers to disobey and disregard the consent order in Suit No 24–418 of 2001. In pursuant of that, Ever Noble has filed Civil Suit No 22–759 of 2006 against the firm and the committee members of the association representing the purchasers. In that suit Ever Noble is seeking to injunct the firm and the partners from continuing their acts to conspire with the purchasers to disobey and sabotage the consent order. Further, Ever Noble is also claiming for costs, exemplary damages, damages for economic sabotage and a host of other forms of damages.

[10] Before me in this present application, there is not an iota of evidence produced by Ever Noble to suggest that the firm and/or the partners has done the acts complained of. Where is the conspiracy that is alleged and the sabotage plan that is harped on? It has to be shown how the professional conduct of the firm is likely to be impugned by taking up briefs in the instant case. The affidavits filed in support of this application do not provide the relevant evidence for this court to adjudicate on. The statement of claim

against the firm in Civil Suit No 22–759 of 2006 does contain general averments and allegation of conspiracy and sabotage against the firm, but that is all. This in my view is insufficient to prove that rr 4 and 43 of the Rules has been breached. There is also no evidence that the solicitors had volunteered advice to bring this action or to stir up strife and litigation.

[11] Speaking of professional independence, I would like to reiterate what I have stated in *RS Muthiah v Pembinaan Fiba Sdn Bhd* [2004] 4 MLJ 78 to the effect that maintaining professional independence has always been the hallmark of an advocate and solicitor in handling a matter. It is for that reason that r 5 has been legislated. Messrs Cheong Wai Meng & Van Buerle represents the defendants in both Suit No 22–484 of 2006 who are the committee members of the association representing the house buyers and also the defendants in Suit No 22–759 of 2006, the very same committee members in Suit No 22–484 of 2006. In Suit No 22–759 of 2006 Messrs Cheong Wai Meng & Van Buerle and the partners are also cited as the defendants alongside the committee members. In the present Suit No 22–753 of 2006, Messrs Cheong Wai Meng & Van Buerle is representing 74 plaintiffs comprising of the committee members and other purchases of the condominium units. Is there anything wrong or improper about that? It is beyond any reasonable minded person's comprehension to suggest that there is a conflict of interest or a breach of professional independence in the circumstances. It is the same people that the firm is representing in all the three suits and the only difference is that the capacity of the parties represented are either as the plaintiffs or the defendants. Again, it is not shown as to how the conflict of interest has arisen on the part of the firm.

[12] Next, focusing on Ever Noble's objection on the ground that the solicitors of the firm has acted without the authority of one of the defendants in Suit No 22–484 of 2006, Ever Noble must be having r 5(b)(ii) of the Rules in mind. In respect of this ground, Ever Noble has also filed a complaint to the Lembaga Tatatertib Peguam as exhibited in exh TSS 2 of encl 18, the affidavit in support of this application. With all due respect, I think to disqualify the solicitors from acting for the plaintiffs on this ground is misconceived. The authority to act in Suit No 22–484 of 2006 has nothing to do with the present suit. The absence of authority to act in Suit No 22–484 of 2006 is in respect of one Mr Lim Keat Lee who was named as the sixth defendant therein. If at all this is an issue, the proper forum to ventilate the issue would be in that particular suit and not in the present suit here. The said Mr Lim Keat Lee is not a party in the instant case. The issue of whether that amounts to a professional conduct likely to be impugned may be relevant elsewhere but certainly not in the present application.

[13] It is an established principle that lawyers should not act as counsel and witness in the same proceedings and this has been embodied in r 28. It reads:

28 Advocate and solicitor not to appear in a case where he is a witness

(a) An advocate and solicitor shall not appear in Court or in Chambers in any case in which he has reason to believe that he will be a witness in respect of material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardizing his client's interests.

(b) An advocate and solicitor shall not appear before an appellate tribunal if in the case under appeal he has been a witness on a material and disputed question of fact in the Court below.

(c) This rule does not prevent an advocate and solicitor from swearing or affirming an affidavit as to formal or undisputed facts in matters in which he acts or appears.

[14] As Humpreys J stated in *R v Secretary of State for India In Council & Ors, ex parte Ezekiel* [1941] 2 All ER 546:

> A barrister may be briefed as counsel in a case or he may be a witness in a case. He should not act as both counsel and witness in the same case.

[15] On this issue, counsel for Ever Noble submits that Mr Tan Swee Cheng and Mr Louis Van Buerle will be called as witnesses and he referred to exh TSS 2 p 17 in encl 30. Enclosure 30 is an 'affidavit tambahan defendan' filed in support of this application. Exhibit TSS 2 contains an excerpt from the notes of proceedings in Saman Pemula No 24–418 of 2000. The parties in the said Saman Pemula are UG Jayantha and Lim Beng Poh as plaintiffs suing in their own capacity and also for an on behalf of all the purchasers of condominium units in Menara Kuda Lari. The defendant is Ever Noble Sdn Bhd exh TSS 2 shows that Mr Louis Van Buerle together with SC Tan and Kelly Tan appeared for the plaintiffs, Mr Darshan Singh for the receivers and managers and Cik Daphne Choy for the defendant. The relevant part of p 17 exh TSS 2 referred by counsel reads as follows:

> Court to Mr Darshan
>
> Will your client be calling Mr Louis Van Buerle as a witness?
>
> Mr Darshan
>
> My clients will be calling him as a witness. I now apply orally for him to be disqualified from acting for the plaintiffs as counsel.

[16] From my reading of exh TSS 2, it is clear that if at all Mr Louis Van Buerle will be called as a witness, he will be called only in that proceeding and not in the instant case. Saman Pemula No 24–418 of 2000 is totally a different case. This court has no idea at all as to what the subject matter is in the said saman pemula. Neither has this court been appraised as to what is the outcome of that case. As such I am unable to see the relevance of the objection to counsel appearing or representing the parties in that case to the present application. There is no merit in the argument of counsel on this point.

[17] Similarly the learned counsel's submission that Mr SC Tan will have to explain the complaint lodged against him on an alleged false affidavit filed by him in Suit No 22–484 of 2006 will make him a witness is in my considered view also irrelevant in the instant case. Just because there was an objection against Mr Louis Van Buerle in Saman Pemula 24–418 of 2000 and a complaint lodged against Mr SC Tan to the Lembaga Tatatertib Peguam in respect of Suit No 22–484 of 2006 does not automatically mean that they ought to be restrained in the instant case. Each case must run on its own facts and circumstances. In my considered view, in order for an advocate and solicitor to be disqualified under r 28 of the Rules, it must be demonstrated that his appearance as a witness is in respect of a material and disputed question of facts. This has to be proved and the burden lies on the party seeking for the disqualification. Upon considering the whole facts and circumstances of this case, I found that the evidence is lacking. The affidavits filed in support of this application in encls 18 and 30 do not disclose what material and disputed question of facts that the advocate and solicitor would be required to testify as a witness in the present proceedings. A party making an application for disqualification under the said rule is not at liberty to make general assertions that the advocate and solicitor will be a witness in the case. There must be sufficient material for the court to consider whether in the particular circumstance of the case, the prohibition in r 28 applies. In the circumstances of this case, I find that there is insufficient material to justify this court to deny the right of the advocate and solicitor from representing their clients in the instant case.

[18] The courts have an inherent power and authority to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular individual in a particular case. Similarly the right of a particular individual to be represented by an advocate and solicitor of his own choice is also not absolute. It is the court that will determine that right. The reason for this limitation is well illustrated in the case of *Emperor v Dadu Ramu* AIR 1939 Bom 150 where it was stated by Beaumont LJ as follows:

> The question whether the court has jurisdiction to forbid an advocate to appear in a particular case involve the consideration of conflicting principles. On the one hand an accused person is entitled to select the advocate whom he desires to appear for him, and certainly the prosecution cannot fetter that choice merely by serving a subpoena on the advocate to appear as a witness. On the other hand, the court is bound to see that the due administration of justice is not in any way embarrassed … An advocate cannot cross-examine himself, nor can he usefully address the court as to the credibility of his own testimony, and a court may well feel that justice will not be done if the advocate continues to appear. But, in my opinion, the prosecution in such a case must establish to the satisfaction of the court that the trial will be materially embarrassed, if the advocate continues to appear for the defence.

[19] Before concluding, I must also address the submissions of the plaintiff's counsel on the issue of abuse of court process by Ever Noble. It has been submitted that the filing of this application is merely an attempt on the part of Ever Noble to stifle the proceedings, in particular the plaintiff's application under O 81 of the Rules of the High Court. The plaintiffs also contend that there is a duplicity and multiplicity of proceedings filed by Ever Noble and this amounts to an abuse of the process of the court and could cause embarrassment to all parties involved including the court. As I have stated in the earlier part of this judgment, evidently there is a lot of legal tussle between Ever Noble and the purchasers of the condominium and the committee members of the association representing these purchasers. The firm is representing and acting for these purchasers and committee members. While there may be in existence of no less then three civil suits between the parties here in the High Court of Pulau Pinang, that by itself is no ground to hold that there is duplicity of proceedings, let alone an abuse of court process. In my view for the purposes of this application, this issue of duplicity and multiplicity of proceedings is irrelevant and it ought to be ventilated when the appropriate time comes, namely, at the hearing of this suit. For that reason, I need to dwell no further on the subject matter and shall leave it to the discretion of the parties to pursue the matter at the appropriate time and occassion.

[20] In conclusion, for the reasons stated above, the application in encl 19 is hereby dismissed with costs.

Application dismissed with costs.

Reported by K Nesan